

IN THE
Supreme Court of the United States

Supreme Court, U. S.

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OCTOBER TERM, 1975
NO. 75-708

STANLEY MARKS, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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Petitioners herein seek a Writ of Certiorari to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit (520 F.2d 913) which in turn affirmed judgments of conviction entered against the Petitioners in the United States District Court for the Eastern District of

Kentucky. Among the issues presented in the Petition is the propriety of charging the jury on the obscenity standards enunciated in *Miller v. California*, 413 U.S. 15 (1973), when the conduct charged occurred prior to that decision. Among the reasons presented for granting the Writ is the present conflict among Circuit Courts of Appeal on this question.

In its Memorandum of Opposition, the Respondent admits the existence of the Circuit Court conflict. See Memorandum for the United States in Opposition, at 3. The Respondent contends that the conflict need not be resolved in this case, however, for two reasons. First, the Court of Appeals held the materials herein obscene under both the *Roth-Memoirs* and the *Miller* standards. Second, the Respondent contends that the conflict among the Circuits is not one of substantial continuing importance.

Respondent's first contention in this regard misses the mark for two reasons. The conclusion of the majority below that the materials are obscene under either standard is of questionable import since no member of that Court ever even viewed the materials. See 520 F.2d, at 923 n.1. Additionally, the question here presented does not in any way relate to opinions of the judiciary as to the nature of the materials. The issue here revolves around the instructions given to the jury at trial. Had the jury been instructed on the *Roth-Memoirs* formulation, as it would have been had the case arisen in the First, Fifth, Ninth or District of Columbia Circuits, an acquittal might have obtained and the materials might never have been before the Court of Appeals for review.

The Respondent's second contention is simply incorrect since the question presented is one of continuing and widespread importance.

On January 18, 1976, the United States Court of Appeals for the Tenth Circuit issued a judgment and opinion in *United States v. Freidman*, No. 75-1079. That judgment and opinion affirmed a judgment of conviction entered in the United States District Court for the Western District of Oklahoma for interstate transportation of obscene material in violation of 18 U.S.C. § 1465. *Freidman*, like the instant case, involved pre-*Miller* conduct (occurring on or about December 10, 1970) and a post-*Miller* trial with jury instructions following the *Miller* formulation.

Yet another instance of pre-*Miller* conduct adjudicated in a post-*Miller* trial is presented in *United States v. Carter, et al.*, Cr. No. 72-207, in the United States District Court for the Western District of Tennessee. Though the conduct there involved occurred prior to the *Miller* decision, the jury was instructed, in accordance with the Sixth Circuit Rule for which review is here sought, on the *Miller* obscenity standard. The trial of that case, which involved two individual and two corporate defendants, stretched over three weeks. All Defendants were found guilty and all are now seeking review of their judgments of conviction in the Sixth Circuit Court of Appeals.

As this Brief is being written, yet another substantial case which will be affected by the *Marks*' decision is occurring in the United States District Court for the Western District of Tennessee. The case, entitled *United States v. Gerber, et al.*,

Cr. No. 73-45, involves approximately 20 defendants. The trial has thus far consumed over four weeks, and at least two more weeks thereof appear likely. Though this obscenity case involves pre-Miller conduct, under the Sixth Circuit rule, Miller jury instructions may be anticipated. If conviction is obtained, a substantial number of appeals would likely follow.

Finally, two further indictments have been returned in the United States District Court for the Western District of Tennessee charging various obscenity violations on the basis of pre-Miller conduct. The case of *United States v. DeSalvo et al.*, Cr. No. 75-90 involves eighteen defendants and can be expected to require a trial of several weeks. The decision in *Marks* will have an obvious impact upon this extensive litigation. The other case presenting the potential for such an impact is *United States v. Peraino*, Cr. No. 75-91. That case also involves eighteen defendants charged with pre-Miller obscenity offenses. The trial, scheduled to begin within a few months, will require several weeks and, since it occurs within the geographical limits of the Sixth Circuit, it will be substantially affected by the *Marks* decision.

It is therefore respectfully submitted that the conflict in the Circuits which the Respondent admits is one of continuing and vital importance to equal administration of criminal laws within the United States. A Writ of Certiorari should therefore issue to review the judgment and opinion of the Sixth Circuit and to ensure that the enumerable defendants affected or to be affected by the *Marks* decision

receive the same treatment they would receive if their cases arose in other areas of the country.

Respectfully submitted,

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